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NO. 84-826

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

LOUIE L. WAINWRIGHT,
Director, Florida Department of
Corrections,

Petitioner,

v.

OSCAR BROWN BOYKINS, JR.,

Respondent.

# RESPONSE OF OSCAR BROWN BOYKINS, JR. TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 18, 1985

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE ELEVENTH CIRCUIT PROPERLY REFUSED TO APPLY THE PROCEDURAL DEFAULT DOCTRINE OR AN EXHAUSTION BAR WHERE WAINWRIGHT FAILED TO RAISE THE ISSUE IN THE DISTRICT COURT.

II. WHETHER THE ELEVENTH CIRCUIT'S APPLICATION OF DUE PROCESS AND FUNDAMENTAL FAIRNESS PRINCIPLES WAS APPROPRIATE. WHETHER WAINWRIGHT WAIVED ITS RIGHT TO COMPLAIN BY FAILING TO ADDRESS THE MERITS BOTH IN THE DISTRICT COURT AND ON APPEAL TO THE ELEVENTH CIRCUIT.

III. WHETHER THE ELEVENTH CIRCUIT HELD THAT DUE PROCESS PREVENTS A STATE FROM MAKING EXPERT TESTIMONY ABOUT PAST MENTAL PROBLEMS IRRELEVANT TO THE QUESTION OF WHETHER A DEFENDANT KNEW RIGHT FROM WRONG AT THE TIME OF THE ACT. WHETHER WAINWRIGHT WAIVED ITS RIGHT TO COMPLAIN BY ITS ABDICATION OF DUTY IN BOTH THE DISTRICT COURT AND IN THE ELEVENTH CIRCUIT.

## STATEMENT OF THE CASE

Petitioner's statement of the case is supplemented with the following corrections, clarifications, and addition of material facts.

References herein to the Petition for Writ of Certiorari are made as Pet. Cert., followed by the appropriate page. The claim upon which Respondent-Boykins was granted habeas corpus relief in the court below is referred to as the "Rodriguez claim".

In connection with Petitioner's assertion that the Rodriguez claim was not discussed in terms of the federal constitution in Respondent's direct appeal brief (Pet. Cert. 8-9), the following is added: Respondent's first issue in that appeal dealt with the related issue of the exclusion of Dr. Rodriguez from the courtroom during the testimony of other witnesses. Respondent argued, "sequestration of witnesses is a viable tool in protecting the integrity of the fact-finding process, but we must be vigilant in protecting a criminal defendant's right to provide himself with the best possible defense. Cf. Braswell v. Wainwright, 330 F.Supp. 281, 283 (S.D. Fla. 1971), modified, 463 F.2d 1148 (5th Cir. 1972)." (p.8; Respondent's brief, direct appeal). The constitutional principles discussed in Braswell are self-evident. The federal district court below was not called upon to decide whether this argument and citation was sufficient for exhaustion purposes since exhaustion was not raised.

As to Petitioner's suggestion that there was an absence of objection or waiver by Respondent in the state trial court at the time of the exclusion of Dr. Rodriguez' testimony (Pet Cert. 9-10), the following is tendered: Petitioner's brief on direct appeal in Florida did not allege a procedural

default of any kind. (pp. 9-11). Moreover, the District Court of Appeal of Florida, First District, did not invoke procedural default against Respondent in denying relief. From the following language of the court, it is apparent that relief was denied on the merits:

> "We have given full consideration to the record, briefs and oral argument of the parties. It appearing therefrom that appellant has failed to demonstrate that prejudicial error was committed in the proceedings below, the judgment and sentence appealed herein is affirmed." Boykin (sic) v. State, 305 S.2d 831 (Fla. 1st DCA 1975)(Pet. Cert., A-37-38).

To the extent that Petitioner implies that its motion to strike followed the pre-evidentiary hearing stipulation (Pet. Cert., 11), the petition is in error. The motion to strike (reproduced in its entirety in appendix, A-1-5) was filed instead of a response following the magistrate's order to show cause.

The motion to strike did not allege " that all other issues" except ineffective assistance of counsel were barred because of procedural default. As noted by the court below:

> "That motion did assert that certain of Boykins's claims had been waived, but did not identify those claims except by reference to Boykins's state habeas petition in which he acknowledged not having pursued certain arguments on direct appeal. His 'Rodriguez' claim was not among those he admitted to have neglected.

Boykins v. Wainwright, 737 F.2d 1539, 1545 n.3 (11th Cir. 1984). On page one of the motion to strike, Respondent's federal habeas Rodriguez claim was identified as claim "d-2". The claims that the motion suggested were not raised on direct appeal were identified as "Issues Two, Three, Four and Five . . . " (paragraph 9). Even assuming that Petitioner's reference to Issue Four was intended as a reference to federal habeas issue d-2,

that reference was in error. The subject matter of the Rodriguez claim was raised on direct appeal, as now acknowledged by Petitioner. Thus, Petitioner's implication that its motion to strike raised the procedural default issue as to the Rodriguez claim is misleading.

The motion to strike did not allege a failure to exhaust state remedies. In fact, in paragraph 5 thereof, Petitioner alleged that the issues being raised in the federal habeas corpus petition were the same issues which had been raised on collateral attack. Petitioner failed to correct this error until its petition for rehearing in the court below. (pp. 4-5).

Petitioner fails to mention the magistrate's order of July 15, 1980, i.e., some six months after the filing of the motion to strike (A-6-7). That order, which scheduled the evidentiary hearing, states:

> "The pleadings pass out of the case and are superseded by this Order amendable by Order of Court."

As to the Rodriguez claim, the magistrate's report and recommendation found that even if error, it was harmless. Neither exhaustion nor procedural default was recommended as a basis for denying relief on that claim.

Petitioner did not file objections to the report and recommendation. The district court adopted the report and recommendation.

Petitioner did not take an appeal or seek a cross appeal on Respondent's appeal to the Eleventh Circuit. Respondent argued the merits of the Rodriguez issue in his appeal. Petitioner did not dispute Respondent's argument on the merits. In fact, Petitioner did not discuss the merits in any fashion. Instead of addressing the issue raised in Respondent's appeal,

for the first time throughout the litigation of this case, Petitioner's two page response argued that Respondent's state brief on direct appeal had failed to allege the Rodriguez claim in terms of a federal constitutional claim. (pp.18-19).

Following the panel's decision, Petitioner filed a Petition for Rehearing En Banc. There, for the first time, Petitioner argued that the federal court's do not sit to correct errors in state evidentiary law; and that as a matter of state law, the state trial court had ruled correctly in excluding Dr. Rodriguez' testimony. (p. 9-10). Petitioner acknowledged its failure to argue Florida law in its appellate brief, but defended on the ground that it had never argued Florida law in the district court either. (p. 11).

## REASONS WHY WRIT SHOULD BE DENIED

### I. THE ELEVENTH CIRCUIT PROPERLY REFUSED TO APPLY THE PROCEDURAL DEFAULT DOCTRINE OR AN EXHAUSTION BAR BECAUSE WAINWRIGHT FAILED TO RAISE THE ISSUES IN THE DISTRICT COURT.

Petitioner points to two pleadings to support its contention that it properly raised the procedural default issue in the district court. Petitioner's statement of facts in support is misleading. Petitioner's argument that Respondent's claim was not presented to the state courts in terms of federal constitutional law was not voiced at all in the district court or before the magistrate. And, ironically, what Petitioner raises here is an exhaustion issue, and not a procedural default issue. Anderson v. Harless, 459 U.S. 4, 103 S.Ct. 276 (1982). See also, Campbell v. Wainwright, 738 F.2d 1573, 1577 n.3 (11th Cir. 1984). Petitioner's pleadings in this case evidence its confusion over this point.

At best, Petitioner raised vaguely the general

claim of procedural default before the magistrate, and not in the district court as it states. As described in the statement of the case herein, the motion to strike was inherently ambiguous. When Petitioner's secret code of confusing references to various claims is deciphered, it is apparent that its default argument did not even encompass the Rodriguez issue. In reality, Petitioner did little more than suggest to the magistrate that he figure it out if he could, and " . . . if [Boykins] has raised issues which were not raised on direct appeal and these issues could have been so raised, absent a showing of both 'cause' and 'prejudice', the issues are not proper grounds for habeas corpus relief." (paragraph 9)(emphasis added). Thus, not only did the motion fail to assert the claim Petitioner now raises, it did not even make a general allegation of failure to exhaust state remedies. These circumstances are aggravated when one considers paragraph 5 of the same motion to strike. Therein, Petitioner alleged that the federal habeas issues were the same issues which had been raised on collateral attack. This allegation was clearly wrong as to the Rodriguez issue. Petitioner failed to correct its error until its petition for rehearing before the Eleventh Circuit. (p. 4-5). In the context of a case with a confusing history, where the record is filled with numerous hand written pro se pleadings, this does not meet the standard expected of Petitioner. If this were not enough, Petitioner fails to advise this Court that even its ambiguous motion to strike passed out of the case by virtue of the magistrate's order several months later. That order also specifically advised the parties that it was amendable by order of the court. Thereafter, Petitioner never sought any further ruling on its motion to strike.

The other pleading relied on by Petitioner is the pre-evidentiary hearing stipulation. Petitioner refers to only

the first of the two sentences devoted to this point. (Pet. Cert., 11). The second sentence states: "Said waiver resulted from [Boykins'] failure to raise on direct appeal certain issues which were raised for the first time in a Rule 3.850 motion filed subsequent to the disposition of the direct appeal." (paragraph 5)(emphasis added). This pleading is even more meager than the motion to strike because it failed to identify the "certain issues" to which it referred and failed to provide any argument or authority or further explanation. Obviously, it did not assert that the Rodriguez issue had not been couched in federal constitutional terms. Nor did it raise even a general exhaustion claim.

The magistrate's report and recommendation reached the merits of the Rodriguez issue. Notwithstanding, Petitioner filed no objections whatsoever. Petitioner thereby failed to properly preserve even its inapplicable general claim that Respondent was guilty of procedural default Absent any objections by Petitioner, the district court adopted the magistrate's recommended disposition on the merits.

Petitioner's complete failure to raise the exhaustion claim in the district court operates as a waiver thereof. Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983); see also numerous citations in Boykins v. Wainwright, 737 F.2d at 1545. When a federal habeas corpus applicant is guilty of such tactics, Petitioner does not hesitate to label it sandbagging. Petitioner's scathing indictment of the Eleventh Circuit under these circumstances is wholly inappropriate.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF DUE PROCESS AND PRINCIPLES OF FUNDAMENTAL FAIRNESS WAS APPROPRIATE UNDER THE FACTS OF THIS CASE. IN ANY EVENT, PETITIONER HAS WAIVED ITS RIGHT TO COMPLAIN BY ABDICATING ITS RESPONSIBILITY IN THE COURTS BELOW.

The state trial court's exclusion of Dr. Rodriguez' highly probative and crucial testimony in a hotly contested insanity defense trial, severely impeded Respondent's right to present his sole defense. Under the compelling facts of this case, the Eleventh Circuit's decision was plainly correct.

Petitioner's present complaint, i.e., that the issue was no more than one of state evidentiary law, should not be heard. As noted, the magistrate's recommendation decided the issue on the merits only. Petitioner filed no objections, thereby failing to provide the district court notice of its alleged procedural default claim. The district court then adopted the magistrate's recommendation. Petitioner did not take an appeal or seek a cross appeal.

In Respondent's appeal to the Eleventh Circuit, he [Boykins] argued the only issue decided adversely to him, i.e., the merits. Remarkably, Petitioner totally ignored the issue raised in Respondent's brief. Instead, Petitioner chose to rely solely on the alleged procedural default. Even at that, Petitioner failed to point out the two pleadings upon which it now relies in defense of its own waiver. Consistent with its failure to provide the district court with the benefit of its view of Florida law, Petitioner's brief likewise failed to cite any Florida law or even make the argument it now makes. (Wainwright's brief, p. 18-19). Not until its petition for rehearing did Petitioner address the merits. There Petitioner sought to justify its nonfeasance with the unusual argument that it had not argued the merits in the district court either. (Petition for Rehearing, p.11).

By fa'ling to address the merits of the case in its brief before the court below, Petitioner put the Eleventh Circuit at peril in precisely the same fashion that it did the district court. By virtually any standard of appellate advocacy, Petitioner's actions must be viewed as irresponsible. Given its own abdication of duty, Petitioner's characterization of the Eleventh Circuit's "inability or unwillingness" to follow the law is repugnant.

Respondent respectfully submits that any action beyond swift denial of the writ Petitioner seeks, could only serve to condone Petitioner's pattern of sandbagging and dereliction of duty which is apparent from Petitioner's actions in each court below.

III. THE ELEVENTH CIRCUIT DID NOT HOLD THAT DUE PROCESS PREVENTS A STATE FROM MAKING EXPERT TESTIMONY ABOUT PAST MENTAL PROBLEMS IRRELEVANT TO THE QUESTION OF WHETHER A DEFENDANT KNEW RIGHT FROM WRONG AT THE TIME OF HIS CRIME.

Petitioner's claim is but a slight variation to the preceding claim. There is no substitute for a full and fair reading of the Eleventh Circuit's opinion, which reveals that Petitioner has mischaracterized the holding. Moreover, Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318 (1946), has little no applicability to the case at bar.

Interestingly, even in its petition for rehearing, where for the first time Petitioner argued the merits, Petitioner did not cite Fisher v. United States.

Petitioner's chastisement of the Eleventh Circuit continues under this issue as well. Petitioner makes the novel argument that it would have been inappropriate for it to make an alternative argument on the merits due to its declination to

argue the merits in the district court. (Pet. Cert., 30). Petitioner must not be permitted to benefit from its own default. Petitioner's squeeze play on the Eleventh Circuit simply did not work. Petitioner must live with the failure of its own highly questionable strategy.

## CONCLUSION

The petition for writ of certiorari lacks the character of reasons which are considered worthy of certiorari review. Respondent submits that it would not be appropriate for the Court to consume its scarce resources in deciding issues which are unlikely to promote the development of the law.

Even more importantly, Petitioner has completely failed to preserve any of the issues presented through a continuing pattern of waiver, default, and neglect. In light thereof, this cause simply lacks the historical facts necessary to decide the issues presented.

Accordingly, Respondent-Oscar Brown Boykins, Jr., respectfully requests this Honorable Court to deny the petition.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By: Howard W. Skinner
HOWARD W. SKINNER
Assistant Federal Public Defender
Post Office Box 4998
Jacksonville, Florida 32201
(904) 791-3039

COUNSEL FOR RESPONDENT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, has been furnished to Lawrence A. Kaden, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, by mail, this 18th day of January, 1985.

Howard W. Skinner
Assistant Federal Public Defender

# APPENDIX

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FILED

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OSCAR BROWN BOYKINS, JR., *

Petitioner, *

vs. * Case No. 79-1042 Civ. J-M

LOUIE L. WAINWRIGHT, Secretary Department of Offender Rehabilitation, State of Florida, *

Respondent. *

*

MOTION TO STRIKE

Comes now Respondent, Louie L. Wainwright, pursuant to Federal Rule of Civil Procedure 12(f), by and through his undersigned attorney, and would file this his Motion to Strike and as reasons therefore would show:

1. On November 21, 1979, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254.

2. The Petition states five grounds for relief including:

a) The trial judge failed to instruct the jury as to the consequences of a verdict of not guilty for reason of insanity.

b) The trial court failed to hold a Sanity Hearing for Petitioner's trial.

c) The prosecutor made prejudicial remarks and submitted irrelevant and prejudicial material to the jury.

d) [1] The trial judge failed to affirm Petitioner's due process voir dire.

[2] The trial judge unduly restricted the examination of a witness for Petitioner.

e) Ineffective assistance of counsel

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3. On January 3, 1980, this Court entered an Order to Show Cause directing Respondent to answer the allegations raised by the Petition and to show cause why the Petition should not be granted.

4. On direct appeal from his conviction, Petitioner raised the following issues.

a) Whether the trial court erred in denying Petitioner's request to exempt a witness from the rule.

b) Whether the trial court erred in refusing to allow an expert witness to testify as to Petitioner's past mental history and to the nature of this mental illness.

c) Whether the trial court erred in refusing to give a jury instruction request by Petitioner concerning the consequences of a jury verdict of not guilty by reason of insanity.

d) Whether the trial court erred in refusing to instruct the jury on the applicable penalties as requested by Petitioner.

e) Whether the Petitioner, as a matter of law, was legally insane at the time of the commission of the crime.

(See Appendix "A")

5. On August 17, 1978, Petitioner filed a Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, wherein he raised the same issues as are being presently raised (See Appendix "B", pages 5-6). Contained in the Motion is an admission by Petitioner that grounds two, three, four, and five were not raised on direct appeal, allegedly due to a lack of interest by the Public Defender's office (See Appendix "B", page 6).

6. Petitioner's Motion for Post-Conviction Relief was denied by the trial court because the first four issues should have been raised on a direct appeal and the fifth one (ineffective assistance of counsel), was without merit (See Appendix "C").

7. On December 28, 1978, Petitioner appealed the foregoing denial to the First District Court of Appeal, and on September 25, 1979, the First District affirmed the trial court's ruling (See Appendix "D" and "E").

8. It is a well-settled rule of law in Florida that if an issue may be raised on direct appeal and is not raised at that time, a defendant waives the right to raise that claim in a collateral proceeding. Spinkellink v. State, 360 So. 2d 85 (1977); Richardson v. State, 247 So. 2d 296, (Fla. 1971). It is equally well-settled in the federal system that issues which were not raised on a direct appeal, when they could have been raised at that point in time, will not serve as grounds for habeas corpus relief. See Wainwright v. Sykes, 433 So. 2d 72 (1977); Spinkellink v. Wainwright, 578 F.2d 582 (5th Circ. 1978); and United States v. Timmrek 25 CrL 3030(1979). The only qualification to this rule is if a petitioner can show "cause" and "prejudice" attendant to the state procedural waiver, then the issue may be reviewed in a habeas corpus proceeding. See Francis v. Henderson, 425 U.S. 536 (1976).

9. Applying the foregoing law to the case at hand, Respondent would submit that if Petitioner has raised issues which were not raised on direct appeal and these issues could have been so raised, absent a showing of both "cause" and "prejudice", the issues are not proper grounds for habeas corpus relief. Petitioner readily concedes in his Motion for Post-Conviction Relief that Issues Two, Three, Four, and Five were not raised on direct appeal. His only "cause" (reason) for not having properly raised these issues is essentially that his counsel was ineffective. The Fifth Circuit has held that an allegation of ineffective assistance of counsel is insufficient as a matter law for purposes of demonstrating the requisite "cause" pursuant to Francis, supra.

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See Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977).

It is clear that Francis requires a showing of both "cause" and "prejudice" in order for a Petitioner to secure habeas corpus review in cases such as the one at hand. As a matter of law, Petitioner has failed to make a proper showing of "cause". Since Petitioner has failed to make the necessary showing of "cause", it is abundantly clear that he is not entitled to habeas corpus review of the issues which have been waived as a result of his failure to raise the issues on his direct appeal. Respondent would note that since "cause" has not been shown, it is unnecessary to demonstrate that "prejudice" has not been shown either. In any event, it is clear that Petitioner has failed to make a proper showing of "prejudice" based upon the issues that he has raised.

WHEREFORE, for the foregoing reasons, Respondent would respectfully request that this Court strike any issue raised in the Petition which could have been raised on direct appeal but was not. Specifically, Issues Two, Three, Four, and Five should be stricken pursuant to Sykes, Spinkellink, Timmbrek, and Lumpkin.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: _____
MIGUEL A. OLIVELLA, JR.
Assistant Attorney General

THE CAPITOL, Suite 1501
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to Mr. Oscar B. Boykins, #A-040496, Florida State Prison, Post Office Box 747/L-13-3110, Starke, Florida, 32091, by United States mail on this 24th day of January, 1980.

MIGUEL A. OLIVELLA, JR.
Assistant Attorney General
OF COUNSEL

FILED
CLERK, U.S.
DISTRICT COURT

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MIDDLE DISTRICT
OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OSCAR BROWN BOYKINS, JR., A040496, :

Petitioner :

vs. : No. 79-1042 Civ-J-M

LOUIE L. WAINWRIGHT, Secretary Offender Rehabilitation, State of Florida, :

Respondent :

ORDER

THIS CAUSE came on for consideration upon the filing of a petition for writ of habeas corpus filed by a State prisoner, Oscar Brown Boykins, Jr., pro se, in forma pauperis. Counsel was appointed to represent the indigent Petitioner and a Pre-evidentiary Hearing was held. A Pre-evidentiary Hearing Stipulation has been entered into by counsel for both Petitioner and Respondent. It is thereupon

ORDERED and ADJUDGED:

1. An Evidentiary Hearing is hereby scheduled before the undersigned Magistrate for the 23rd day of September, 1980, at 10:30 o'clock a.m., in the United States Court of Appeals Courtroom, Fourth Floor, United States Courthouse and Post Office Building, 311 West Monroe Street, Jacksonville, Florida, 32202, at which time evidence will be taken upon the issues raised in the Stipulation and witnesses will be heard as outlined in said stipulation. The pleadings pass out of the case and are superseded by this Order amendable by Order of Court.

2. That Respondent shall produce Petitioner for said hearing and shall transport Petitioner to Jacksonville, Florida not less than three (3) days prior to the hearing in order that Petitioner may confer with his attorney, provided that Petitioner is in custody of Respondent. Should Petitioner not be in custody of Respondent

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at the time of said hearing, Respondent is relieved of the duty to transport Petitioner to the evidentiary hearing.

DONE and ORDERED in Tampa, Florida, this 15th day of July, 1980.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

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